Case No 68894 IN THE

SUPREME COURT OF SOUTH AFRICA (APPELLATE

DIVISION)

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF

SOUTH AFRICA Appellant

v

LINDA ANN BASDEO First Respondent

and

NOEL CAMPBELL Second Respondent

CORAM : CORBETT CJ, HEFER, NESTADT,
F H GROSSKOPF JJA et SCOTT AJA

HEARD : 5 SEPTEMBER 1995

DELIVERED : 21 SEPTEMBER 1995

JUDGMENT

HEFER TA

This appeal relates to the death of first respondent's husband ("the deceased") who died as a result of a bullet wound sustained when a member of the Defence Force shot at a car in which he was a passenger. What has to be decided is (1) whether the deceased was killed unlawfully; if so (2) whether the shot was fired negligently and (3) whether contributory negligence has been established on the part of second respondent who was the driver of the car at the time of the incident.

These were the main issues in an action brought against the appellant by first respondent in the Durban and Coast Local Division for the recovery of the damages which she and her minor children allegedly suffered in consequence of the deceased's death. She alleged in the particulars of claim that her late husband's death was caused by the "wrongful and unlawful acts alternatively the negligence of one or more members of the South African Defence Force whose identities are to the Plaintiff unknown." Appellant

admitted in its plea that the deceased was shot by a member of the Defence Force acting within the course and scope of his employment but denied negligence on the part of the member concerned and, on grounds which will presently emerge, that he acted unlawfully. Second respondent became a party to the proceedings when appellant joined him as a third party. In the notice served upon him in terms of Rule 13 of the Uniform Rules of Court appellant alleged that second respondent's negligent conduct was a contributory cause of the shooting. By agreement between the parties the question of liability was tried separately. After hearing evidence the trial court ruled that negligence on second respondent's part had not been established and that the appellant was liable since the soldier who fired the shot, did so unlawfully and negligently. The appeal has been noted upon leave granted by the trial judge and is directed at both these rulings.

Before entering upon a discussion of the issues it is convenient to

recount briefly how it came about that the deceased was shot.

The undisputed evidence is to the effect that a Defence Force unit under the command of lieutenant Muller set up a roadblock during the evening of 14 June 1990 on the South Coast Road near the southern border of Natal for the purpose of intercepting arms which were known to be brought into the country illegally from Transkei. Since they were only interested in vehicles travelling northwards after entering Natal from the south members of the unit erected a boom extending over the western traffic lane; vehicles travelling southwards were allowed to pass freely. The immediate vicinity of the boom was brightly illuminated by means of electric lights, and appropriate signs and flashing lights were erected south of the boom to warn northbound drivers that they were approaching a roadblock. Lieutenant Muller and some of his men manned the boom and two "stopper" groups were despatched northwards and southwards to

prevent vehicles from escaping in either direction. Riflemen Aposlolides and Wichmann formed the southern group. They positioned themselves next to the road at a point about 378 metres from the boom. Needless to say all the soldiers were armed.

Different versions of the shooting which occurred later that evening were presented to the court by second respondent who testified for first respondent and members of lieutenant Muller's detail who testified for the appellant. Since second respondent's evidence on the crucial issues was rejected and the appeal was argued mainly on the basis of the trial court's factual findings, it is not necessary to deal comprehensively with his version. From the accepted evidence as a whole the following picture emerges.

The deceased and second respondent both resided in Durban. At about 17h45 the two of them left the city in the deceased's car. Second

respondent was the driver. Their destination was an hotel situated in Transkei not far from the border where they were to meet their wives who had preceded them by bus earlier that day. On their way southwards second respondent noticed the roadblock. Realizing, as he said in his evidence, that it "was for the cars coming from the Transkei" he drove past. Thereafter, at a spot where the vehicle could not be seen from the boom or by the southern stopper group, he turned round and drove back. After proceeding for a considerable distance past the "Roadblock Ahead" signs he slowed down, made a U-turn and sped back towards the border.

Apostolides and Wichmann were not aware that the car had originally passed them from the north. What they observed was a vehicle which, as far as they were concerned, had Approached from the direction of the border. Conceiving the manoeuvres of its driver to be an attempt to evade the roadblock both of them stepped onto the road and into the path of the

approaching vehicle. Wichmann flagged the driver down with his torch whilst Apostolides signalled him to stop in the usual way by raising his hand. But their signals went unheeded and with the car bearing down on them they jumped out of the way. After it had passed Apostolides fired a single shot, aiming his rifle at a spot below the left-hand tail light. His objective was to hit the wheel, immobilize the car and apprehend its driver. The unfortunate result was that the bullet struck the tarred surface of the road somewhere behind the car, ricocheted and hit the deceased after penetrating the car and passing through the left front passenger seat where he was seated. He was rushed to hospital but succumbed to his injury a week later.

In view of the principle that "every man has a right not to be injured in his person or property" (per Innes CJ in Cape Town Municipality v Paine 1923 AD 207 at 216) it was incumbent upon the appellant to justify the

deceased's death (Minister of Law and Order v Monti 1995 (1) SA 35 (A)

at 39 G-I) by pleading and eventually establishing facts which would

legally render his injury lawful. The justification pleaded in paragraph 7

of the plea is the following:

> "(b) On the 14th June, 1990 and on Main South Coast Road, members of the South African Defence Force were employed in a service as contemplated by Section 3(2)(a) of the Defence Act, 1957 in connection with the maintenance of law and order and the prevention of crime;

(3) in terms of the provisions of Chapter XIII of the Regulations published by Government Notice R325 of 24 February, 1984 as amended, the said members of the South African Defence Force had the powers and duties conferred or imposed upon a member of the South African Police Force under Sections 21, 22, 23(a), 25, 27, 29 to 36, 39 to 41, 44 and 47 of the Criminal Procedure Act, 1977;

(4) 'The said members were manning a roadblock with the purpose of tracing and confiscating unlicensed firearms and ammunition and arresting offenders;

(5) The driver of the vehicle in which the deceased was travelling approached the said roadblock, made a U-turn and raced away from it, and attempted to kill two members of the South African Defence Force when they stepped into the road in order to stop him;

(6) By doing so, the driver of the said vehicle committed an offence as contemplated under the First Schedule to the Criminal Procedure Act, 1977 in the presence of the said members of the South African Defence Force, who thereupon became entitled to arrest him without a warrant;

(7) In an endeavour to arrest the said driver and to prevent him from fleeing, one of the said members of the South African Defence Force who reasonably believed the said driver to have committed such offence, fired one shot at the vehicle;

(h) No other reasonable means were available to stop and arrest the said driver;

(i) The said shot accidentally struck the deceased."

It will be noticed that there is no specific allegation relating to the lawfulness vis-à-vis the deceased of the conduct of the member who fired

the shot. The only allegation linking the former to the shooting is that the bullet struck him accidentally. But when paragraph 7 is read in the context of the denial of unlawfulness earlier in the plea, it becomes clear that all the other averments constitute the facts and circumstances of the case on which appellant relies for its assertion that the deceased was not injured unlawfully. That is the way in which Mr Marnewick, who appeared for the appellant in both courts, presented his client's case. His contention was that, taking account of all the circumstances and particularly the fact that the deceased was accidentally struck by a shot lawfully fired at the car in the pursuit of a legitimate purpose and in performance of the shooter's duty, his death did not occur in consequence of an unlawful act.

This submission depends, of course, on the correctness of its first premise viz that the allegations in paragraph 7(e) to (h) have been established. The trial judge did not consider the lawfulness of Apostolides's

conduct vis-à-vis second respondent and did not record an express finding whether the latter deliberately tried to run Apostolides and Wichmann down, or whether they could reasonably have suspected him of an attempt on their lives; nor did he consider whether either of them was entitled to arrest second respondent. In order to consider the validity of the argument relating to the question of lawfulness I am prepared to accept at this stage (I will revert to these matters in another connection) that all these issues should have been decided in appellant's favour. Mr Marnewick did not challenge the principle that conduct which is lawful towards one person may be unlawful towards others. (George nO v Minister of Law and Order 1987(4) SA 222(SECLD) at 228H-I; Boberg: The Law of Delict 31.) Moreover, he expressly disavowed any suggestion that section 49(2) of the Criminal Procedure Act may by itself be utilized as justification for the infliction of harm to persons other than the person whose arrest is sought

to be effected or whose flight is sought to be prevented. (Cf Hughes en Andere v Minister van Wet en Order en Andere 1992 (1) SACR 338 (A) at 343e-344b). In view of these concessions I will presume, without finding, that Apostolides was entitled to arrest second respondent for attempted murder and that he would have been entitled in terms of section 49(2) to shoot at the car in the way in which he did, had second respondent been its only occupant. In short I will presume that, had second respondent been the sole occupant, Apostolides's conduct would have been entirely lawful.

Since we know that second respondent was in fact not the only occupant the question is whether the conduct in question can also be regarded as lawful in respect of its consequences to the other occupant. This question falls to be decided by applying the general criterion of reasonableness referred to in cases such as Marias v Richard en 'n Andere 1981 (1) SA 1157 (A) at 1168C-E; Lillicrap, Wassenaar and Partners v Pilkington

Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 498G-H and Knop v Johannesburg City Counsel 1995 (2) SA 1 (A) at 27 I. In doing so we must bear in mind that the value judgment which the application of the general criterion of reasonableness requires, is based on considerations of morality and policy and the court's perception of the legal convictions of the community, and entails a consideration of all the circumstances of the case. (Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A) at 797F; Knop v Johannesburg City Counsel supra at 27E-I; Boberg : op cit 33; Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 318E-I; Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 832in fin-833A; Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) at 570D-F.)

The trial court's ruling that the deceased's injury was the result of unlawful conduct on the part of Apostolides is mainly based on a finding

that the presence of a passenger in the car was reasonably foreseeable. Taking into account further the manner and circumstances in which the shot was fired (matters with which I will deal presently) the learned judge came to the conclusion that Apostolides "was not justified in firing at the car."

Mr Marnewick challenged the finding that the presence of a passenger was reasonably foreseeable. In an alternative argument he contended that it is in any event irrelevant to the question of lawfulness whether Apostolides should have foreseen that second respondent might not have been the only occupant of the vehicle : even if he had been aware of the deceased's presence, so the argument went, Apostolides would still have been entitled to shoot at the vehicle in an attempt to prevent second respondent from fleeing; and, had he actually hit the wheel and thereby caused the car to overturn and burst into flames, his conduct would still have been lawful vis-à-vis both its occupants. I will deal with the

alternative argument first.

There can be no doubt that, had Apostolides actually been aware of the deceased's presence, he would have had a legal duty towards him to act reasonably in the exercise of his powers of arrest. In saying this I am not unmindful of the need for criminals to be detained and brought to justice, and of the duty of every police officer, and all others to whom police powers have been entrusted, to do so; nor am I insensitive to the inherent difficulties of such a hazardous task. We cannot pretend to be unaware, moreover, of the public outcry in recent times for better protection against crime, and for offenders to be brought to book speedily and effectively in order to receive their just deserts. On the other hand, however, we must bear in mind that section 49(2) invests arresting officers with the power of taking human lives even on a mere (albeit reasonably held) suspicion. Such an awesome power plainly needs to be exercised with great circumspection

and strictly within the prescribed bounds. Section 49(2) should not, and indeed cannot, be regarded as a licence for the wanton killing of innocent people; nor can any attempt to extend its operation to cases not falling within its ambit be countenanced. (Cf Hughes en Andere v Minister van Wet en Orde en Andere supra at 345g-346d.)

It is in effect for such an extension that Mr Marnewick contended because, what his argument really amounts to, is that an arresting officer may exercise his powers under section 49(2) notwithstanding any actually foreseen harm it may cause to innocent bystanders. If correct, his submission would entail, for instance, that a police officer would be legally blameless if he were to shoot in a crowded street at a fleeing suspect and his bullets were to kill innocent bystanders. (Cf Mhlongo and Another NO v Minister of Police 1978 (2) SA 551 (A).) Precisely how untenable such a proposition is, becomes plain once it is realized that negligence, or even

recklessness, on the part of the policeman in the postulated case would be entirely irrelevant. The submission falls to be rejected as offensive to the legal convictions of the community and accepted principles of morality and legal policy.

That the foreseeability of harm is a relevant consideration in the determination of lawfulness is clear. The reason for its relevance is perhaps best illustrated in the following passage in Millner's Negligence in Modern Law(1967) 25 :

> "The law lays down two tests for ascertaining the existence of a duty of care; firstly, that the injury was such as a reasonable man would have foreseen and guarded against; secondly, that the nature of the interest infringed was one which the law protects against negligent conduct. These two elements must occur to give rise to a duty of care.
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> Now it is plain that the first test is in no way different from the test applied in order to decide the 'negligence issue', that is, in order to answer the question : was the defendant's conduct negligent? It reiterates the identical abstract standard of reasonableness. If a reasonable man, placed in the

> circumstances of the defendant, would have foreseen that his conduct might endanger or prejudice others in regard to their legally protected interests, then the defendant is deemed to have been under a legal duty towards such others to exercise appropriate care."

In Administrateur, Natal v Trust Bank van Afrika Bpk supra at 833

E-H Rumpff CJ cited another passage from Millner's work which reads as follows :

> "The duty concept, on the contrary, shows abounding vitality. The key to this paradox is the utility of this concept as a device of judicial control over the area of actionable negligence on grounds of policy. Here the ascertainment of liability is linked to the second of the two elements of duty of care referred to above. This second element is not at all concerned with reasonable foresight; it is to do with the range of interests which the law sees fit to protect against negligent violation."

The remark in the last sentence refers, not to the duty concept in general, but to that concept in so far only as it allows for judicial control on grounds

of policy. That this is what Millner intended to convey, appears from his own emphasis on the words "on grounds of policy" and from his analysis which has already been quoted. This is obviously how Rumpff CJ understood it since he found (at 835E-G) that the defendant did not owe the plaintiff a legal duty because he could not reasonably have anticipated that the plaintiff would not make proper enquiry. (Cf Bayer South Africa (Pty) Ltd v Frost supra at 574 I-575 C.)

In the present case Apostolides readily conceded that he could not see whether there were passengers in the car and did not even consider such a possibility. But, simply because it is such a common occurrence, I agree with the trial judge that he should reasonably have foreseen that the person whom he wanted to arrest might not be alone in the car. In this regard the present case is distinguishable from Prince and Another v Minister of Law and Order and Others 1987 (4) SA 231 (ECD) on which Mr Marnewick

relied. In that case a policeman pursued a car for a considerable time and distance before he decided to shoot at it. Despite the fact that the chase occurred at high speed over poorly surfaced roads and that the policeman hooted in order to attract the attention of the driver (235G-I), no other occupant revealed his presence. Understandably, therefore, the policeman could not reasonably have foreseen the presence of a passenger asleep on the back seat.

The conclusion that the presence of a passenger was reasonably foreseeable leads us to the last stage of the enquiry into the lawfulness of Apostolides's conduct. As indicated in the first quoted passage from Millner, the so-called "duty issue" is determined by the answer to the question whether it was reasonably foreseeable that others may be harmed by the conduct in question. In the present case the foreseeability of the presence of a passenger does not supply the entire answer. Should it

emerge that the circumstances were such that Apostolides could safely shoot at the car without the risk of injuring an occupant other than the driver, the risk of harm would probably not have been foreseeable. Further enquiry into the circumstances reveals, however, that this was not the case. The target was not an easy one : all that could be seen of the rear of the vehicle was probably the tail lights and number-plate light. Had the target been stationary and shooting conditions good, it might not have required a great deal of skill to hit one of the lights or to put a shot into the area immediately beneath it. But the car was moving away from the shooter and conditions were anything but good. It was a dark moonless night and Apostolides had no means of gauging the rapidly increasing distance to his target with any measure of certainty. He could probably not even see the barrel, let alone the sights of his rifle; he had to rush the shot because the vehicle would soon disappear round a bend in the road; and he was using

a standard military rifle of unknown accuracy at the relevant range. In these circumstances where an accurately placed shot was out of the question, the possibility of harm to a passenger was real and entirely foreseeable. The trial court's finding that Apostolides unlawfully caused the deceased's death was unavoidable.

The finding that he was negligent is beyond criticism. The enquiry relating to this issue is, of course, so intertwined with the previous one that much of what has already been said, goes towards proof of the unreasonableness of his conduct. All that needs to be added, is that the circumstances in which he fired at the car were such that a reasonable man in his position would not have done so. I am unable to accept Mr Marnewick's submission that his conduct amounted at worst to an error of judgment for which he cannot be blamed. Admittedly he did not have ample time for reflection but I do find it significant that his evidence is to

the effect that he deliberately shot at the left wheel because he realized that a shot at the other one could endanger traffic that might have been approaching from the south. The more obvious danger - the risk of injuring a passenger in the very car at which he decided to shoot - did not occur to him. In my view his conduct deviated from the norm of the reasonable man to such an extent that it cannot be ascribed to a non-culpable error of judgment.

Finally there remains the question of second respondent's alleged contributory negligence. The trial court's reasoning was to the effect that second respondent, being an "ordinary citizen who decided that he did not wish to go through a roadblock", was perfectly entitled to evade it; that he had no knowledge of the operation of a roadblock, and no reason to anticipate the possibility of his vehicle being shot at.

1 have no quarrel with the proposition that a person who does not

wish to drive through a roadblock, is generally not obliged to do so. An unfortunate feature of the present case is that second respondent's behaviour has not been satisfactorily explained. We do not really know why he turned back after driving past the boom on his way south; nor why, having done so and having re-entered the area of the roadblock (this is how the witnesses referred to the stretch of road between the southernmost "Roadblock Ahead" sign and the boom), he again changed direction and sped back towards the border. The trial judge did not expressly reject his explanation but did not expressly accept it either. The learned judge did, however, (quite correctly, it would seem) reject second respondent's assertion that he did not execute the U-turn within the area of the roadblock but that he did so out of sight of those members of lieutenant Muller's unit manning the boom. In view of the rejection of this material part of his evidence and of a considerable degree of improbability attaching to his

explanation for turning round twice, one can only speculate on the real reason. Be that as it may, we must accept that second respondent acted entirely within his rights. But we must also accept, on the other hand, that his conduct would have been highly suspicious to an uninformed observer, taking into account particularly that he executed the U-turn with screeching tyres at a point estimated by Muller as no further than 150 metres from the boom, and then sped back again. Such an observer would have had every reason to believe that the driver had suddenly become aware of the roadblock and was anxious to avoid it. This was precisely the impression gained by Apostolides and Wichmann and other members stationed at the boom, and exactly the reason why the former two stepped into second respondent's way and tried to get him to stop.

We know that second respondent did not heed the signals to stop. We also know that Apostolides and Wichmann were forced to jump out of

the way of the speeding vehicle. In this connection I mentioned earlier that the trial judge did not record a finding whether second respondent deliberately attempted to drive Apostolides and Wichmann down. In the course of his judgment the learned judge did, however, make certain observations which have to be dealt with.

Some of appellant's witnesses spoke in their evidence about another car, a Mercedes Benz, travelling southwards which slowed down when Apostolides and Wichmann entered the road upon observing second respondent's U-turn. Referring to this vehicle as "the Mercedes Benz" and to the one driven by second respondent as "the Ford" the learned judge said:

> " This is an important feature of the case because it follows that while the Mercedes Benz vehicle was slowing down, the Ford vehicle was accelerating towards the stopper group. It follows furthermore that Wichmann did not have his torch on until after the Mercedes Benz vehicle continued on its way. He says that he does not know whether it was on before then

but it would seem more probable that he did not have it on as it would have been a signal to the Mercedes Benz which they did not wish to stop. In these circumstances it must be accepted that the torch was put on by Wichmann while he was approximately in the centre of the road after the Mercedes Benz proceeded on its way. At this stage we know that the Ford vehicle was accelerating towards Wichmann and Apostolides. It would have been difficult to see their army browns until the Ford vehicle was fairly close to them. Apostolides estimated that they would have seen them at a distance of between 20 and 30 meters.

The members of the stopper group testified they could not say whether the Ford vehicle had its lights on bright or dim. It would seem to me probable that they were not on bright as that would have been a feature which would have struck them.

It follows from this evidence that Campbell had no real reason to think that the torch was connected with the roadblock. If he was accelerating he would, as a matter of probability, at a very late stage have become aware of these two figures in army browns. This all presupposes that he was then paying attention to what was in the road directly in front of him. One must bear in mind that this was a dark night and that in all probability there were no vehicles proceeding from the South as none was mentioned. He would have seen a vehicle proceeding South some distance ahead of him so would not expect any obstructions between him and that vehicle.

> Because of the nature of his evidence, there is no evidence available of what it was that he in fact saw. Even on Defendant's version, he would at a very late stage have become aware of these two figures in the road and, on Defendant's version, one must accept that he decided to carry on regardless expecting them to move out of the way which of course they did."

I do not entirely agree with the learned judge's inferences or with his reconstruction of the events. According to Apostolides, whose evidence was accepted, the Mercedes Benz passed them when the Ford was still more or less at the spot where the U-turn had been executed ie some 200 metres away. Having allowed the Mercedes to pass Wichmann switched on his torch and second respondent accordingly had ample time to see it even though he was accelerating. In my view he had every reason to associate the torch with the roadblock. He was perfectly aware of the fact that he was driving away from the boom; after all, he had passed it only a short time earlier when he noticed that it was manned by soldiers and that

it was "for the cars coming from the Transkei." He must have known, moreover, that his violent U-turn had attracted the attention of those very soldiers. In addition he could not possibly have failed to see, and appreciate the significance of, two other uniformed soldiers appearing in front of him and signalling him to stop. As Apostolides put it when asked whether they would have been visible to the driver of the approaching vehicle : "I have no doubt that we were visible, we were right in the middle of the southbound lane... we were highly visible." The possibility, deriving from the supposition that he was driving with dimmed lights, that he might have seen these two soldiers "at a very late stage" is irrelevant. The fact of the matter is that he must have seen them at some stage, and he must have seen them scampering out of his way. Yet, instead of stopping and at least finding out what was going on, he drove on regardless of the risk he was taking, not only for himself, but also for his passenger.

For he knew that the soldiers were armed - he had seen that when he passed the boom earlier - and he should reasonably have anticipated that they might use their weapons. In my view his negligence has been established. As a contributing cause of the deceased's injury and subsequent death I would not, however, rate his fault higher than 40%.

For these reasons the following order is made :

(8) The appeal against the order in favour of the first respondent is dismissed with costs including the costs of two counsel.

(9) The appeal against the order in favour of the second respondent is upheld with costs including the costs of two counsel.

(10) The order of the court a quo is amended by the addition of :

"It is declared that the third party is liable to the defendant for 40% of the plaintiffs damages."

J J F HEFER JA

CONCURRED:

CORBETT CJ
NESTADT JA F H
GROSSKOPF JA
SCOTT AJA